15995

No. ~~15590~~

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

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District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 9-8-58—40

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

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JURISDICTION

The jurisdiction of the District Court was invoked under Title 28 USCA, § 2241 and Title 5 USCA, § 1009. The jurisdiction of the Court of Appeals is invoked under Title 28 USCA, § 2253 and Title 28 USCA, § 1291.

STATEMENT

The appellant is an alien, having been born in Finland on November 24, 1908. He entered the United

States in 1909 and has resided in this country continuously since then. He registered under the Alien Registration Act.

On June 17, 1952, a warrant for the arrest and deportation of the appellant was issued by the District Director of the Immigration & Naturalization Service, which said warrant was served upon appellant on or about September 12, 1952. A hearing was thereafter held before Louis C. Hafferman, Special Inquiry Officer, which began on May 11, 1953 at Portland, Oregon and terminated on May 21, 1953.

On June 30, 1953, said special inquiry officer issued a written decision determining that the appellant was deportable for the reason that he had become a member of the Communist Party of the United States after entry into this country. The specific finding was that he had been a member of the Communist Party during the years 1937-1939. Said officer ordered appellant to be deported.

On April 2, 1953, appellant filed a timely notice of appeal to the Board of Immigration Appeals from the decision of the hearing officer.

On September 8, 1953, the Board of Immigration Appeals, after considering appellant's Points on Appeal, dismissed the same.

On November 11, 1954, appellant filed a motion to reopen the proceedings to enable him to apply for suspension of deportation. Appellant having been afforded the opportunity at the original hearing before the Im-

migration & Naturalization Service to apply for discretionary relief, which he did not do, and in the motion to reopen, appellant not having expressed a disavowal of membership in a subversive organization within the period of ten years last past, said motion was, on November 29, 1954, denied by the Board of Immigration Appeals.

On December 10, 1954, appellant again filed a motion to reopen the proceedings to enable him to make application for suspension of deportation, which said motion was granted by the Board of Immigration Appeals on December 23, 1954, and the warrant of deportation theretofore issued was withdrawn.

On February 2 and 3, 1955, the reopened hearing on appellant's application for suspension was held before a special inquiry officer in Portland, Oregon, who made and entered a written opinion on February 16, 1955 in which appellant's motion was denied.

On March 2, 1955, appellant appealed the decision of the special inquiry officer to the Board of Immigration Appeals.

On May 13, 1955, the Board of Immigration Appeals dismissed the appeal.

In the meantime and on December 13, 1954, appellant filed a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the United States District Court for the District of Oregon, the same being numbered Civil 7833 in the court below. On January 30, 1956, an Amended Peti-

tion for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action was filed.

On February 21, 1956, trial was held in the United States District Court for the District of Oregon before The Honorable Gus J. Solomon, District Judge.

On March 2, 1956, Judge Solomon filed a written opinion and on March 6, 1956, ordered the Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief be dismissed and the writ of habeas corpus theretofore issued be discharged, and remanded appellant to the District Director, Immigration & Naturalization Service, to be held for deportation pursuant to the warrant and order of deportation previously issued.

On March 7, 1956, an appeal was taken to this court (*Niukkanen v. Boyd,* No. 15061), and thereafter, on February 8, 1957, this court sustained the decision of the court below by *per curiam* opinion (241 F.2d 938), stating specifically that it was for the reasons stated in the District Court's opinion reported in 148 F. Supp. 106.

A Petition for Writ of Certiorari to the Supreme Court of the United States was denied on December 16, 1957, 355 U.S. 905, 2 L.Ed. 2d 259.

On December 27, 1957, appellant filed a motion with the U. S. Immigration & Naturalization Service for an order requiring another hearing to be held, contending that the Supreme Court decision of December 9, 1957 in *Rowoldt v. Perfetto,* 355 U.S. 155, redefined the evidential and substantial requirements of membership

in the Communist Party as a basis of deportability and was such as to take appellant herein out of the class of deportable aliens. After careful reconsideration of the entire record the motion was denied by the Board of Immigration Appeals; the Board pointing out that appellant's petition for certiorari was denied eight days after the Supreme Court announced its decision in *Rowoldt*. Petitioner was notified by the District Director of the Immigration & Naturalization Service to surrender himself for deportation to Finland.

On April 4, 1958, appellant filed his present Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action (R. 3-23).*

On April 10, 1958, a trial was held in the court below on appellant's petition and complaint and on April 14, 1958, the court entered its order dismissing the complaint and discharging the writ of habeas corpus theretofore issued (R. 46, 35). A notice of appeal was filed on April 14, 1958 (R. 36, 37).

Appellant's Points on Appeal (R. 87, 88) vary from his statement of the questions involved as stated on Page 5 of appellant's brief, and the Specification of Errors (App. Br. 6). Appellant has apparently abandoned Paragraphs 2 and 3 of his Points on Appeal. Since said points were not included in appellant's Specification of Errors and no reference thereto having been

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* In this brief, "(R.....)" refers to the printed record of the proceedings in the U. S. District Court, and "(Tr.....)" refers to Exhibit 1, and typewritten transcript of the hearings before the Immigation and Naturalization Service.

made in appellant's brief, he must have considered them to be without merit and no further reference will be made thereto by appellee.

SPECIFICATION OF ERROR NO. 1

Appellant states that the District Court erred in failing to declare null and void the order of deportation issued by the Immigration & Naturalization Service, because "the alleged membership of Petitioner in the Communist Party was not meaningful or political as defined in *Rowoldt v. Perfetto,* supra."

SUMMARY

At the hearings before a special inquiry officer in May 1953, two former members of the Communist Party, Walter Wilmot and Lee Knipe, testified that they knew petitioner as a member of the Communist Party from 1937 to 1939, and had seen him at closed party meetings (Tr. 12-17, 26, 27, 65-67).

Walter Wilmot, who had been editor of the *Labor New Dealer* in Oregon from 1937 until his expulsion from the Party in 1939 and had attended meetings of many branches of the Party in that capacity (Tr. 13-15, 30), testified that appellant belonged to the Albina Branch and was in the "top fraction" of the Party (Tr. 27) and that he was present at a high-level meeting in Aberdeen, Washington, which was attended by appellant; that this meeting was called a "plenum" where reports were made as to the work carried on in the

Northwest (Tr. 19) and that those party members attending this plenum were the "annointed" people and all members attending were known in advance by the credentials committee (Tr. 27).

Knipe testified that appellant took an active part in meetings of the Albina Branch of the Communist Party and that he was on the executive board of the branch, although he did not hold office (Tr. 66-68). He testified further that he had attended at least 30 to 35 closed Communist Party meetings at which appellant was present, and at the meetings appellant took quite an active part in the discussions (Tr. 67). At another point in his testimony, the witness was asked the question, "At how many meetings did you see Mr. Mackie?" and the witness answered, "He attended regular each week. I would say from about a year and a half at least. A year and a half." (Tr. 93). He testified that as educational director, he taught members of that group the works of the Soviet Union (Tr. 93). The witness was further asked, "Now is your testimony in this hearing based on any animosity towards Mr. Mackie?" and the witness answered, "None whatsoever. We were very close friends." (Tr. 73).

At the 1953 deportation hearings, appellant was given the opportunity to refute the testimony of these two witnesses and to explain his participation, if any. He refused to accept this invitation, even though he was warned of the consequences of his failure to testify.

Although appellant had not applied for suspension of deportation during the 1953 hearings, the proceedings

were reopened, on his motion, to permit him to apply for such relief. At hearings held in February 1955, appellant testified that in 1937 and 1938, he belonged to a federation for the unemployed, which probably was the Workers Alliance (Tr. 195, 196). He denied that he had ever seen Wilmot (Tr. 200). He testified that he knew Knipe, but did not know whether Knipe was identified as an officer of a particular organization; and that he saw Knipe at dances and meetings of the unemployed council or Workers Alliance (Tr. 199, 200). When asked by his attorney if he ever attended Communist Party meetings, appellant answered (Tr. 200):

> "Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were communist and maybe they wasn't. It could have been and maybe they wasn't."

He later testified that he had never knowingly been a member of the Communist Party of the United States (Tr. 204).

The special inquiry officer recommended that suspension of deportation be denied (Tr. 6a-11a). He pointed out that the alien was "evasive as to his activities during the period between 1930 and 1940, particularly as to whether or not he had been a member of the communist party". (Tr. 8a). He found that "the alien's testimony that he does not recall or denial of membership in the communist party is not credible" (Tr. 10a-11a). The Board of Immigration Appeals affirmed (Tr. 1a-4a), finding that appellant "failed to submit any evidence showing that he is actively opposed to the

doctrines and teachings of the communist party", and that while there was clear evidence that appellant had been a member of the Party from 1937 to 1939, there was no proof of complete disassociation (Tr. 4a).

The court below (R. 77, 78) stated with clarity why he felt that the *Rowoldt* decision could not be determinative of the facts applicable to the present case. After commenting about the witness Knipe, the court stated in part as follows:

> "As far as the other testimony is concerned, if the testimony is to be believed—and the board apparently believed it—this man went to meetings over a period of a year and a half regularly. He attended weekly meetings. He worked at the bookstore even though he didn't get any money. He met at the Labor New Dealer back office. He went to Aberdeen where there was a district director of the communist party. Rappaport was there on a high-level meeting. He was not a plain ordinary member, according to the testimony, but he was a man who was on the executive board. Now that is a lot different than Rowoldt. It does not make any difference whether he denies it or not; that is what the administrative board held, and just because he denies it, you cannot say that this is a better case than Rowoldt. The fact is that there is much more in this record than that in the Rowoldt case.
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> . . . . .
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> "Perhaps I should make it clear that I not only think there was evidence in the record to sustain the findings that way, but I believe that the testimony is true. I believe the testimony of Bob Wilmot, and I believe the testimony of Knipe, and I do not believe Mr. Mackie's testimony. I believe that he perjured himself before, and I believe that he perjured himself today because I think that the evidence is clear that he was a member of the com-

> munist party during the period in which it is said that he was a member."

The court further stated (R. 81):

> " . . . . . I am convinced that petitioner does not come within the reach of the Rowoldt decision."

ARGUMENT

There was sufficient probative evidence at the deportation hearings to support the finding that appellant was a knowing member of the Communist Party from 1937 to 1939. Issues of credibility were for the trier of fact. As the Board of Immigration Appeals noted in its original decision, even if the testimony of the witness Knipe is not credited (although the testimony as to his prior conviction of forgery does not require that his whole testimony be discredited), the testimony of the witness Wilmot was not shaken. That evidence was to the effect that petitioner was a card-carrying, dues-paying, "annointed" member of the party, one of the "top fraction" of his branch. Under these circumstances, appellant cannot be said to have been merely a nominal member within the exception noted by the Supreme Court in *Galvan v. Press,* 347 U.S. 522 @ Page 528, where the test to be applied in determining whether membership in the Communist Party had been established for the purpose of deportation (misquoted by appellant, Page 6 of his brief):

> " . . . . . it is enough that the alien joined the party, aware that he was joining an organization known as the communist party which operates as a distinct and active political organization, and that he did so of his own free will."

The factual situation in this case is almost identical to that in the case of *Schleich v. Butterfield,* 6 Cir. 1958, 252 F.2d 191, in which case the court considered whether the evidence was sufficient to establish the "meaningful association" with the Party as determined in the *Rowoldt* case. The court said in part as follows:

> "Rowoldt v. Perfetto did not change the law with respect to the proof necessary to show membership in the communist party. Galvan v. Press was recognized as the controlling authority. The different ruling was the result of different factual situations. The court closed its opinion in the Rowoldt case by saying, 'The differences on the facts between Galvan v. Press, supra and this case are too obvious to be detailed.' "

Schleich did not testify in the hearing or introduce any evidence to show that his relationship to the party was merely nominal rather than substantial. The court further said:

> "Certainly, there is nothing in the record to show that he did not join the party of his own free will or that he was mistaken about the nature and purposes of the party at the time of joining and thereafter. His years of membership and active participation in organization work compel the opposite conclusion."

Continuing, the court said:

> "In our opinion, the foregoing evidence was sufficient to establish the 'meaningful association' with the party, referred to in the Rowoldt case, and to show that Schleich joined the party, aware that he was joining an organization known as the communist party which operated as a distinct and political organization and that he did so of his own free will, which according the rule laid down in Galvan v. Press, supra, 347 U.S. 522, 528, 74 S.Ct.

> 737, 98 L.Ed. 911, was enough to constitute him a 'member' within the terms of the act."

See also, *Wellman v. Butterfield,* 6 Cir. 4/9/58, 253 F.2d 932.

The *Rowoldt* case is not in point because in that case the petitioner at the time of his arrest admitted that he had been a member of the communist party for a short time, but stated that his reasons for joining were economic, to get food, shelter and clothing. Rowoldt's testimony, which was uncontroverted, overcame the normal inference that one who joins and remains a member of a political organization knows the nature and purposes of that organization. The Supreme Court found that Rowoldt had had no meaningful association with the communist party.

In the present case, there is abundant and convincing evidence that the appellant was a member of the communist party for at least two years, was on the executive board of his branch; was a member of the "top fraction" of the local communist organization; was one of the "annointed" members attending a high-level conference at Aberdeen, Washington; and was regularly present at weekly meetings for a period of at least one year and a half, at which meetings the educational director taught the membership "the works of the Soviet Union". It is reasonable, therefore, to conclude from this evidence that appellant was fully aware of the political nature of the organization of which he was an active member.

Further, appellant's silence at the first deportation

hearing and the fact that he declined to offer any evidence to refute and contradict the very damaging testimony of the government's two witnesses entitled the immigration officer and the trial judge to draw an inference that appellant's association with the Communist Party was a "meaningful association" and that he was joining the organization knowing that it operated as a distinct and active political organization, and that he did so of his own free will. *See Ocon v. Guercio,* 237 F.2d 177, 181, and cases therein cited.

SPECIFICATION OF ERROR NO. 2

Appellant states that the District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, as amended by the Internal Security Act of 1950.

ARGUMENT

Harisiades v. Shaughnessy, 342 U.S. 580 and *Galvan v. Press* fully decide the questions of constitutionality which are here raised by appellant. Further in this connection, these identical questions were raised in appellant's form appeal (Case No. 15061) supra. See also this court's decision of *Ocon v. Guercio, supra.*

CONCLUSION

Judgment of the District Court dismissing the Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief, discharging the writ of habeas corpus and remanding the appellant to the custody of the District Director of the Immigration & Naturalization Service for deportation should be in all things affirmed.

Respectfully submitted,

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